(21,550.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 170.

CLARENCE D. ROBINSON, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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1 *Transcript of Record.*

In the Supreme Court of Appeals of West Virginia.

No. 983.

CLARENCE D. ROBINSON, Plaintiff Below, Plaintiff in Error,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Defendant Below, Defendant in Error.

From the Circuit Court of Marion County.

C. H. Leeds, for Plaintiff, and Plaintiff in Error.
U. N. Arnett, Jr.; John Bassel, for Defendant, and Defendant in Error.

Be it remembered that heretofore, to-wit: At a Supreme Court of Appeals of the State of West Virginia, continued and held at Charlestown, in said State, on Monday, the 9th day of September, A. D. 1907, the following order was made and entered of record, to-wit:

CLARENCE D. ROBINSON

vs.

BALTIMORE & OHIO RAILROAD COMPANY.

This day came Clarence D. Robinson, by C. H. Leeds, his attorney, and presented to the Court a petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Marion County, rendered on the 5th day of July, 1907, in a case in which Clarence D. Robinson was plaintiff and the Baltimore & Ohio Railroad Company was defendant, with a transcript of the record of the judgment aforesaid accompanying the petition, which being seen and inspected by the Court, the writ of error and supersedeas prayed for is granted, but the same is not to take effect until the petitioner, or some person or persons for him, shall have given before the Clerk of the Circuit Court of Marion County bond with good personal security in the penalty of One Hundred Dollars, conditioned according to law.

The petition referred to in the foregoing order is in words and figures as follows:

2 No. 983.

In the Supreme Court of Appeals of West Virginia, Wheeling.

CLARENCE D. ROBINSON, Plaintiff Below, P. E.,
vs.
BALTIMORE & OHIO RAILROAD CO., Defendants Below, D. E.

Petition.

To the Honorable Judges of the Supreme Court of West Virginia:

Your petitioner, Clarence D. Robinson, respectfully represents that he is aggrieved by a final judgment of the Circuit Court of Marion County, West Virginia, rendered on the 5th day of July, 1907, in a certain action then pending in said Court wherein said Robinson was plaintiff and the Baltimore and Ohio Railroad Company was defendant.

A transcript of the record is herewith filed in which the proceedings had in said action fully appear.

3 In the year 1903 Clarence D. Robinson, plainaiff, was engaged in the shipment of coal from Fairmont to various points in other states, shipping this coal over the Baltimore and Ohio Railroad. The carrier Company charged the said Robinson in addition to the rates charged other shippers, those loading by tipple, the sum of fifty cents per ton for the sole reason that said Robinson loaded his coal into the cars of the company "by wagon", and not "by tipple". Said Robinson, in order to get his coal shipped, paid the said excessive sum under protest and on the 19th day of April, 1906, brought this suit in said court to recover the said alleged excessive freight charges of one hundred and fifty dollars, being the amount of the over-charge on said freight. On the fifth day of July, 1907, a jury was waived by both parties and by consent and agreement of the parties the court was substituted in lieu of a jury and the cause submitted to the court to be heard and determined on an agreed statement of all the facts, in writing, which is found on page 12, etc., of the record herewith presented.

And on the 5th day of July, 1907, as aforesaid, a judgment was rendered by said court in favor of the defendant against the said plaintiff, your petitioner.

Your petitioner is advised and represents to your Honors that said judgment is erroneous and that your petitioner is aggrieved thereby in the following particulars.

First, it was error for the court to overrule the plaintiff's motion for a new trial.

Second, the court erred in its judgment.

Your petitioner therefore prays that a writ of error and supersedeas may be awarded him in order that the said judgment may be caused to come before your Honors' Court, that the whole matter in said judgment contained may be reviewed and that the judgement may be reversed. And your petitioner will ever pray.

CLARENCE D. ROBINSON, *Petitioner.*

4 STATE OF WEST VIRGINIA,
Marion County, To-wit:

I, Charles H. Leeds, an attorney and a counsellor, practicing in the Supreme Court of West Virginia do hereby certify that in my opinion the final judgement of the Circuit Court of Marion County, referred to in the foregoing petition, ought to be reviewed by the Supreme Court of Appeals of West Virginia.

Given under my hand this 4th day of September, 1907.

CHARLES H. LEEDS.

(Endorsed by Clerk.)

STATE OF WEST VIRGINIA, *To wit:*

The writ of error and supe-sedeas prayed for in the foregoing petition was allowed in Court at Charlestown on the 9th day of September 1907. Bond is required in the penalty of $100.00 conditioned according to law.

Attest:

WM. B. MATTHEWS,
Clerk Supreme Court of Appeals.

The transcript of the record referred to in the foregoing order is in words and figures as follows:

5 *Record.*

STATE OF WEST VIRGINIA:

Proceedings Before the Circuit Court of Marion County, on the Law Side of said Court, on the 5th Day of July, 1907.

Be it remembered that heretofore, to-wit: on the 19th day of April, 1906, came Clarence D. Robinson, by C. H. Leeds, Esq., his attorney, and sued out of the Clerk's Office of said court, a writ of summons against the Baltimore & Ohio Railroad Company, a corporation, which said summons, with the endorsement of service thereon, is in the words and figures as follows, to-wit:

Summons.

The State of West Virginia to the Sheriff of Marion County, Greeting:

You are hereby commanded to summon Baltimore & Ohio Railroad Company, a corporation to appear before the Judge of our Circuit Court for the county of Marion, at the Clerk's office of said Court, at rules to be held therein on the first Monday in May, 1906, to answer Clarence D. Robinson of a plea of Trespass on the case in Assumpsit. Damages $150.00 dollars.

And have then there this writ.

Witness, R. B. Parrish, Clerk of our said Court, at the Court House in said county, the 19th day of April, 1906, and 43rd year of the State.

R. B. PARRISH, *Clerk.*

6 The Sheriff's return on the foregoing summons is in the words and figures as follows, to-wit:

Served the within writ in Marion County, West Virginia, upon the within named Baltimore & Ohio Railroad Company, a Corporation, on the 20th day of April, 1906, by delivering a copy thereof in writing to Charles Orr, the depot or station agent at Fairmont, Marion County, West Virginia, of said Baltimore & Ohio Railroad Company, who was then and there in service as such; there not being within the State of West Virginia, the president, secretary, cashier, or a member of the board of trustees, directors or visitors or other chief officer, of said Company or any other person on whom service thereof could be had, or any person appointed pursuant to law to accept service of process for it.

W. S. FURBEE, *Deputy.*
For H. R. FURBEE,
Sherif of Marion County, West Virginia.

And at another day, to-wit: At rules held in the Clerk's Office of our said Circuit Court, on the first Monday in May, 1906, came the said plaintiff, by his said counsel, and filed his Declaration against the said defendant, which said Declaration is in the words and figures as follows, to-wit:

Declaration.

STATE OF WEST VIRGINIA,
Marion County, ss:

In the Circuit Court Thereof.

7 Clarence D. Robinson complains of the Baltimore and Ohio Railroad Company, a corporation of a plea of trespass on the case on promises:

For that whereas the defendant, the — day of ——, 1903, in the county aforesaid, was indebted to the plaintiff in the sum of One Hundred and Fifty Dollars for the price of goods, wares, chattels, and effects before that time bargained and sold by the plaintiff to the defendant at his request; and the like sum for the price of goods, chattels and effects before that time bargained and sold by the plaintiff to the defendant at its request; and in the like sum for work and service before that time done and bestowed, and materials for the same work furnished by the plaintiff for the defendant at its request and in the like sum for money before that time lent by the plaintiff to the defendant at its request; and in the like sum for money before that time paid and expended by the plaintiff for the use of the de-

fendant at its request; and in the like sum for money before that time received by the defendant for the use of the plaintiff; and the like sum for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and being so indebted, the defendant, in consideration thereof then and there promised the plaintiff to pay him, on request the several sums of money so due to him as aforesaid.

Yet the defendant, though often requested, has not paid the sum or either of them, or any part thereof to the plaintiff, but refuses so to do, the damage of the plaintiff ($150.00) One Hundred and Fifty Dollars, and, therefore, he brings this suit.

C. H. LEEDS, *P. Q.*

The Bill of Particulars filed with and attached to the Declaration, is in the words and figures as follows, to-wit:

In the Circuit Court of Marion County. In Assumpsit.

CLARENCE D. ROBINSON
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

8 *Bill of Particulars.*

Baltimore and Ohio Railroad Company

To Clarence D. Robinson, debtor, for overcharge of freight on the following shipments by said Robinson, consigned to C. D. Robinson, Winchester, Virginia.

Overcharge car loaded at Fairmont.....$14.27

1903

March 13, 65934, lbs. coal loaded at Fairmont, W. Va. on car No. 3441, M. R. R. consigned to Lehigh Portland Cement Co. Ormrod, Pa., over charge.....$13.33

1903

March 28, 59103 lbs., loaded at Fairmont, W. Va., on car No. 88198, B. & O. consigned to the Lehigh Portland Cement Co. Ormrod Penna., over charge.....$14.80

1903

May the 9th, 64548 lbs. coal loaded at Fairmont, W. Va. on car No. 33873, P. & R. consigned to the *Leigh* Portland Cement Co. West Coplay, Pa. overcharge.....$16.12

1903

May the 9th, 57222, lbs. coal loaded at Fairmont, W. Va. on car No. 88319, B. 7 o. consigned to the Lehigh Portland Cement Co. Ormrod Penna., over charge.....$14.20

1903
March

January, 23, 44600 lbs. coal loaded at Morgantown, W. Va. on car No. 22193, P. & R. consigned to Hamburg Cardovan Leather Co. Newark, N. J. over charge..... $9.96

9

1903.
March.
January 26, 66800 lbs. coal loaded at Fairmont, W. Va. on car No. M. R. R. 3360 consigned to Hamburg Cardovan Leather Co. Newark, N. J. over charge $14.91

1903.
March.
January 26, 68800 lbs. coal loaded at Fairmont W. Va. on car No. B. & O. 72789, consigned Hamburg Cardovan Leather Co. Newark, N. J. over charge $14.91

1903.
February 10, 65800 lbs. loaded at Fairmont, W. Va. on car C. M. St. P. No. 69416 consigned to Goff Kirby Coal Co. Chicago, over charge $16.23

1903.
February 6, 67100 lbs. coal loaded at Fairmont on car No. 65761 B. & O. consigned to Goff Kirby Co. Chicago, Ill. overcharge $16.70

1903.
February 6, 44700 lbs. coal loaded at Fairmont, W. Va. on car No. 2054 J. C. consigned to Goff Kirby Coal C-. Chicago, Ill. over charge $11.16

At another day, to-wit, at the June Rules, held in the Clerk's Office of our said Circuit Court there was an order of enquiry entered.

At another day, to-wit, of said Circuit Court held in and for the County of Marion at the Court-house thereof, on the 11th day of April, 1907, the following order was entered.

10

C. D. *Dobinson*
vs.
B. & O. R. R. Co.

Assumpsit.

This day came the plaintiff by C. H. Leeds, Esq., his attorney, as well as the defendant by U. N. Arnett, Jr., its attorney.

And the Court having maturely considered the demurrer of the defendant, doth over-rule the said demurrer.

Thereupon, for plea, the defendant says that it did not assume in manner and form as the plaintiff against it hath complained, and of this it puts *himself* upon the country and the plaintiff doth the like and issue is thereon joined.

At another day, to-wit, of said Circuit Court, on the 5th day of July, 1907, the following order was entered:

In the Circuit Court of Marion County, West Virginia.

CLARENCE D. ROBINSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Assumpsit.

This day came the plaintiff by C. H. Leeds his attorney, and the defendant, Baltimore & Ohio Railroad Company, by U. N. Arnett, Jr., its attorney, and neither party requiring a jury by consent and agreement of the plaintiff and defendant hereto given the Court is hereby substituted in lieu thereof; and by consent and agreement of the plaintiff and defendant herein this cause is submitted to the Court to be heard and determined on an agreed statement of all the facts and evidence in the cause reduced to writing and signed by the plaintiff and defendant by their respective attorneys, and dated the 5th day of June, 1907, which agreed statement of all the facts and evidence upon which this cause is submitted, heard and de-
11 termined, is herewith filed marked "Agreed statement of facts," and filed herein and made a part of this record—and the Court heard the argument of Counsel.

And the Court having read and considered all the facts and evidence stated in said agreement is of opinion that the plaintiff is not entitled to recover in this suit and that the same should be dismissed, and it is hereby ordered by the Court that this suit be and the same is hereby dismissed, and it is considered by the Court that the defendant recover from the plaintiff its costs expended in and about the defence of this suit.

And the plaintiffs objects to the judgement of the Court and the entering of this order and moves the Court to set aside this judgment and grant him a new trial, which motion the Court hereby overrules and the plaintiff excepts to the action of the Court in overruling said motion.

The "Agreed Statement of Facts," filed in this suit and referred to in the foregoing order, is in the words and figures as follows, to-wit:

In the Circuit Court of Marion County, West Virginia.

CLARENCE D. ROBINSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Trespass on the Case in Assumpsit.

The plaintiff and defendant by their respective attorneys, neither party requiring a jury, and by consent of the plaintiff and defendant hereto given, the Court is hereby substituted in lieu thereof; and by consent and agreement of the plaintiff and defendant herein

this cause is submitted to the Court to be heard and determined on the following agreed statement of all the facts and evidence in the case, to-wit:

That the defendant is a corporation created and organized under the laws of the State of Maryland and doing business in the State of West Virginia.

12 This suit is brought to recover from the defendant the sum of $150.00, an alleged excess of freight charges in handling and shipping eleven several carloads of coal; that the said shipments were made by the plaintiff from Fairmont, Marion county West Virginia, as follows, to-wit:

March, 1903, to C. D. Robinson, Winchester, Virginia, over charge, $14.27, carloaded at Fairmont.

March 13, 1903, 65934 lbs. coal loaded at Fairmont, West Virginia, on car No. 3441, M. R. R. consigned to Lehigh Portland Cement Co. Ormond, Pennsylvania, over charge $13.33.

March 28, 1903, 59103 lbs., loaded at Fairmont, West Virginia, on car No. 88198, B. & O. consigned to the Lehigh Portland Cement Co. Ormrod, Pennsylvania, over charge $14.80.

May 9, 64548 lbs. coal loaded at Fairmont, West Virginia, on car No. 33873, P. & R. consigned to the Lehigh Portland Cement Co. West Coplay, Pennsylvania, over charge $16.12.

May 9, 1903. 57222 lbs., coal loaded at Fairmont, West Virginia, on car No. 88319, B. & O. consigned to the Lehigh Portland Cement Co. Ormrod, Pennsylvania, over charge, $14.20.

March, 1903, 44600 lbs. coal loaded at Monongah, West Virginia, on car No. 22193, P. & R. consigned to Hamburg Cordovan Leather Co. Newark, New Jersey, over charge, $9.96.

March, 1903, 66800 lbs. coal loaded at Fairmont, West Virginia, on Car No. M. R. R. 3360 consigned to Hamburg Cordovan Leather Co. Newark, New Jersey, over charge, $14.91.

March, 1903, 68800 lbs. coal loaded at Fairmont, West Virginia, on car No. B. & O. 72789, consigned to Hamburg Cordovan Leather Co., Newark, New Jersey, overcharge $14.91.

February 10, 1903, 65800 lbs., coal loaded at Fairmont, West Virginia, on car C. M. St. P. No. 69416, consigned to Goff Kirby Coal Co., Chicago, over charge, $16.23.

13 February 6, 1903, 67100 lbs. coal loaded at Fairmont on car No. 6 65761 B. & O. consigned to Goff Kirby Coal Co., Chicago, Illinois overcharge, $16.70.

February 6, 1903, 44700 lbs. coal loaded at Fairmont, West Virginia on car No. 2054 J. C. consigned to Goff Kirby Coal Co., Chicago, Illinois, over charge $11.16.

That said shipments were made by the plaintiff from Fairmont, Marion County, West Virginia, over the lines of the Baltimore and Ohio Railroad; that the same were interstate shipments made from Fairmont, Marion County, West Virginia, to points in the States of Pennsylvania, Virginia, New Jersey and Illinois, respectively; that said shipments were loaded from wagons into cars at Fairmont, West Virginia, and not loaded from coal tipples or from any mines located on the lines of the Baltimore and Ohio Railroad, the said coal was

hauled in wagons from mines in the country to the railroad and loaded into the defendant's cars at Fairmont, West Virginia; that on or before the 26th day of January, 1903, the defendant published a schedule or rate of tariff, for shippers of coal loaded from wagons, which required the shippers of coal loaded from wagon and shipped beyond or out of the state to pay fifty cents per ton in excess of what was charged on similar products loaded from tipples or mines regularly operated along the lines of said road, which said schedule or rate of tariff went into effect on the 26th day of January, 1903; and that the said rate or schedule of tariff for such shippers was regularly published and the publisher rate filed with the Interstate Commerce Commission, and before and at the time of the said shipment the plaintiff had knowledge and notice of said regularly published schedule or rate of tariff for shippers of coal loaded from wagons into cars on the defendant's line of road and knew and had full knowledge that the said defendant by said regularly published rate of tariff required such shippers to pay fifty cents per ton in excess of what was charged on similar shipments loaded from tipples or from mines regularly operated along the defendant's lines of road that this defendant charged $150.00 freight on said several
14 interstate shipments of coal loaded from wagons into the cars were binding upon all of said shippers *which said charges and rates were binding upon all of said shippers* and carriers alike and were binding upon all interstate shipments of coal loaded from wagons into the defendant's cars and that said excess charges being only fifty cents a ton and amounting to $150.00; and that the same were interstate shipments and a matter of interstate commerce; that the said rate so charged *in* the regular rate binding upon all shippers applicable to all shipments of coal loaded from wagons; that the said schedule or rate of tariff regularly published by the defendant and filed with the Interstate Commerce Commission is in the words and figures following, to-wit:

The Baltimore and Ohio Railroad Company.

In Connection With
Lines Parties to Tariff.

Supplement No. 46 to Coal & Coke Series I. C. C. No. 33
(Cancels Supplement No. 45.)

Supplement No. 56 to Coal and Coke Series I. C. C. No. 56
(Cancels Supplement No. 54.)

Supplement No. 22 to Coal and Coke Series I. C. C. 80
(Cancels Supplement No. 19).

"Effective January 26th, 1903, rates named in tariffs C. & C. Series I. C. C. Nos. 33, 56 and 80 and supplements thereto, will apply only on Coal loaded into cars from regular tipples. On any

Coal loaded into cars from side tracks of B. & O. R. R. where tipple is not used, there will be an additional charge of fifty (50) cents per ton, which will be deducted before pro-rating with Connections and added to B. & O. R. R. proportion, and Agents will in such cases make notation on way-bill "Loaded from Wagon."

J. A. Murray, General Coal & Coke Agent, Baltimore, Md.
C. S. Wight, Manager Freight Traffic, Baltimore, Md.
W. L. Andrews, Coal & Coke Agent, Pittsburg, Pa.
H. C. Smith, Freight Tariff Agent, Baltimore, Md.

"Baltimore, Md., January 26th, 1903.

File 25085, J. A. M. 101513 (2500)

Copy.

That on the 19th day of April, 1906, the plaintiff brough- this suit in the Circuit Court of Marion County, West Virginia, against the said defendant to recover the said alleged excess of freight charges of $150.00 for said interstate shipment of coal made by the said plaintiff as aforesaid, and that the said suit is still pending and unde-rmined in this court.

From the above agreed statement of facts and evidence the Court is asked to decide what judgment, if any, should be rendered and to decide *what judgment, if any, should be rendered and to decide* whether or not this Court has jurisdiction of the shipments to which the said published schedule or rate of tariff was applied.

Dated this the 5th day of June, 1906.

CLARENCE D. ROBINSON,
By C. H. LEEDS, *His Attorneys.*
THE BALTIMORE & OHIO RAILROAD COMPANY, *Defendant,*
By U. N. ARNETT, JR., *Its Counsel.*

16 STATE OF WEST VIRGINIA,
County of Marion, To-wit:

I, R. B. Parish, Clerk of the Circuit Court of said county, certify that the foregoing contains a true transcript of the record as taken from the records and papers on file of the cause therein stated.

Given under my hand this the 8th day of August, 1907.

R. B. PARISH, *Clerk.*

Cost of Record $3.50.
(Printed Oct. 8, 1907.)
(Printer's fee for petition, record, index and cover $13.50.)

Compared Nov. 15, 1907.

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

17 At another day, to-wit: At a Supreme Court of Appeals, continued and held at Wheeling, on the 12th day of June, A. D., 1908, the following order was made and entered of record, to-wit:

CLARENCE D. ROBINSON, Plaintiff Below, Plaintiff in Error,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, Defendant Below, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Marion County, Rendered on the 5th Day of July, 1907.

This day came the plaintiff in error, by C. H. Leeds, his attorney, and the defendant in error, by John Bassel and U. N. Arnett, its attorneys, and this case was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, and is submitted for decision.

At another day, to-wit: At a Supreme Court of Appeals, continued and held at Charleston, on the 6th day of October, A. D., 1908, the following order was made and entered of record, to-wit:

CLARENCE D. ROBINSON, Plaintiff Below, Plaintiff in Error,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, Defendant Below, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Marion County, Rendered on the 5th Day of July, 1907.

The Court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. It is therefore considered that the judgment of the Circuit Court of Marion County rendered in this case on the 5th day of July, 1907, be and the same is hereby affirmed, and that the defendant in error do recover from the
18 plaintiff in error thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Marion County.

The decision of points in the foregoing case, as the same appears from the syllabus and written opinion prepared by Judge Miller, was concurred in by Judges Poffenbarger, Brannon, McWhorter and Robinson.

The opinion referred to in the final judgment as aforesaid is in words and figures as follows:

19 **ROBINSON**
v.
BALTIMORE & OHIO R. CO.

Marion County.

Affirmed.

Miller, Judge.

1. Until a schedule of rates filed and published by a common carrier, pursuant to the act of Congress entitled "An Act to Regulate Commerce," has been by the Interstate Commerce Commission declared excessive and unreasonable, a shipper cannot maintain an action at common law in a state court to recover for the excess of freights exacted on interstate shipments, if the rates charged were those fixed by such schedule.

2. On the trial of such a common law action, the rates charged being according to such schedule, nothing but the evidence of a prior adjudication of the Interstate Commerce Commission that such rates are unreasonable and unjust will justify a judgment for plaintiff.

3. The court on such trial will not take judicial notice of such prior adjudication by the Interstate Commerce Commission, but if relied on by the plaintiff, the same must be proven by the record thereof.

4. While the federal courts have exclusive jurisdiction of all actions based on specific remedies given by the said act of Congress, as under sections 8 and 9 thereof, nevertheless, after such adjudication by the Interstate Commerce Commission a state court has jurisdiction of a suit at common law brought against the carrier to recover the excess of freights paid on interstate shipments, such right of action being preserved to the shipper by section 22 of said act.

20 MILLER, *Judge:*

The plaintiff sued the defendant in an action of assumpsit to recover $150.00, the aggregate of certain alleged overcharges of freight on interstate shipments of coal loaded from wagons at Fairmont, West Virginia, and consigned to various persons without the State. The case was tried by the court in lieu of a jury, upon an agreed state of facts, and the finding and judgment of the court thereon being for the defendant, the plaintiff has brought the case here upon a writ of error.

It is agreed that the rate charged the plaintiff was in accordance with an amended schedule, effective January 26, 1903, providing that certain tariffs should apply only to coal loaded from regular tipples, and that on coal loaded from wagons there should be an additional charge of 50 cents per ton, to be deducted before pro rating with connecting lines, and added to the defendant's proportion. It is agreed that this differential in rates on interstate shipments of

coal loaded from wagons into the cars of the defendant was binding on shippers and carrier alike, and that said amended schedule had been regularly published and filed by the defendant with the Interstate Commerce Commission.

There is nothing in the agreement of facts and nothing appears in the record to show that this tariff schedule had at any time prior to the institution of this suit been changed or modified in any of the methods or ways provided by the act of Congress of February 4, 1887, and the several acts amendatory thereof, entitled "An Act to Regulate Commerce," 3 U. S. Comp. Stat. 3150.

To reverse the judgment below plaintiff relies upon the following proposition: First, that the differential of 50 cents per ton on coal loaded from wagons, was an unjust and illegal discrimination against him, for which a common law action accrued to him to re-
21 cover back the excess of freights paid. Second, that such discrimination between rates on coal loaded from tipples and coal loaded from wagons being admitted, the burden was cast upon the defendant to show by competent evidence justification for the excessive rate, and no such justification being shown a prima facie case was made entitling him to judgment. Third, that inasmuch as it is claimed the Interstate Commerce Commission, in the case of the Glade Coal Company vs. Baltimore & Ohio Railroad Company, 10 I. C. C. Rep. 224, April 1904, adjudged the additional charge of 50 cents per ton unreasonable and unjust to the fullest extent and should be abolished, we may judicially know the judgment of the Commission in that case without other proof thereof, and give judgment here accordingly.

With respect to the first proposition it is undoubtedly true that at common law an action does accrue in favor of a shipper against a common carrier, to recover back excessive charges of freight. Such right is as old as the common law itself, and until Congress has acted it is as applicable to interstate and foreign as to local shipments. Western Un. Tel. Co. vs. Call Pub. Co., 181 U. S. 92. It is argued, moreover, that this common law remedy has been preserved by section 22 of the Interstate Commerce Act, providing that "nothing in this act contained shall in any way abridge or alter the remedies now existing, at common law or by statute, but the provisions of this act are in addition to such remedies." The Supreme Court of the United States in the more recent case of Texas & Pac. Ry. vs. Abiline Cotton Oil Co., 204 U. S. 426, not referred to by counsel, has given construction to this provision, and, as we believe, to all other provisions of said act applicable to the case now before us. The action there, as in this case, was to recover back alleged excessive freights charged on interstate shipments. After discussing various provisions of said act and the general scope and purpose thereof, and the jurisdiction of the Interstate Commerce Com-
22 mission with respect thereto, which need not be repeated here, it was determined, according to the fourth point of the syllabus, that "The Interstate Commerce Act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference, and to that end

placed upon carriers the duty of publishing schedules at reasonable and uniform rates; and consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier, according to the act and had not been found to be unreasonable by the Interstate Commerce Commission." All of the shipments involved in this case, according to the agreement of facts, were made in February, March and May, 1903, nearly a year before the decision of the Glade Coal Company case, and when, so far as we know, there had been no adjudication against the rate of the schedule by the Interstate Commerce Commission, and when it was not only the right but the legal duty of the defendant to have charged and collected freights in accordance therewith. It is clearly demonstrated in the opinion of the Court in Railway Co. vs. Oil Co., *supra*, that if said section 22 should be construed as preserving to shippers this common law remedy in advance of a decision of the question of the justness and reasonableness of the rates prescribed thereby, then different courts having jurisdiction might establish by different decisions as many different rates, thereby defeating the very purpose of the act of Congress to establish and maintain uniform rates. At page 442 the Court says: "In other words, we think that it inevitably follows from the context of the act, that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of
23 the act conferred by the ninth section, must be confined to redress of such wrongs as can, consistently with the context, be redressed by courts without previous action by the Commission and, therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of." To the argument that the construction there given the statute would result in great harm, the Court says: "This is only an argument of inconvenience which assails the wisdom of the Legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it."

Bound by this decision of the Supreme Court of the United States, we hold that until a schedule of rates, once filed and published by the carrier, according to the act of Congress, has been by the Interstate Commerce Commission declared excessive and unreasonable, a shipper cannot maintain an action at common law in a state court to recover the excess of unjust and unreasonable freights exacted on interstate shipments where the rates charged were those fixed by such schedule.

With respect to the second proposition, we find that in one case at least it was determined by the Interstate Commerce Commission in a proceeding before it, that the burden of showing discrimination is on the plaintiff, and then upon the carrier to show that the discrimination was justified. Richmond Elevator Co. vs. Pere Marquette Railroad Co., 10 I. C. C. Rep. 629. A different rule was applied, however, in Western Union Tel. Co. vs. Call Pub. Co., *supra;* but these rules have little application here, where, as we have seen,

it has been determined that no such action can be maintained by an interstate shipper in advance of an adjudication by said Commission.

The third proposition presents the only difficult question in the case. In the case of Railway Co. vs. Oil Co., *supra*, at page 446, the Court says: "When the Commission is called upon on the complaint of an individual to consider the reasonableness of an
24 established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all." The decision of the Commission, therefore, in the Glade Coal Company case, abolishing the differential of 50 cents per ton, was, in effect, declaring the same unreasonable and unjust from the beginning, enuring to the benefit of all shippers of interstate commerce, and giving them right of action thereafter to recover the excess of freights paid. The court below, as would seem from the opinion of the learned Judge, disposed of the case upon the ground of lack of evidence by the plaintiff of the injustice and unfairness of the discrimination; and that, having failed on his proof, the burden being his, he was not entitled to judgment. Whatever may be the correct rule of evidence generally in the trial of common law actions of this character, it is now quite clear, from the opinion in Railway Co. vs. Oil Co., *supra*, that the only evidence available in the trial of actions to recover back the excess of freights on interstate shipments, the rates charged being according to the published schedule, nothing but the evidence of the prior adverse adjudication of the Interstate Commerce Commission will justify a judgment for plaintiff. The plaintiff offered no such record. Should the court below then, as we are asked to do here, have taken judicial notice of the judgment of the Interstate Commerce Commission in the Glade Coal Company case? We do not think so, nor can we do so here on review. Courts do not ordinarily take judicial notice of their records and proceedings in other causes, and there are few, if any, instances in which they will take judicial notice, except as precedents, of the decisions and proceedings in other courts in other causes. 1 Elliott on Ev., § 58; Ballard vs. Thompson, 19 Gratt. 14. It is true, of course, as of the public
25 statutes of another state, that the courts of one state, the record thereof being produced, will take judicial notice of the legal effect of a judgment or decree of a court of another state. Shriver vs. Shriver, 30 W. Va. 456, 475. The plaintiff, therefore, must fail for want of legal proof of the prior adjudication by the Interstate Commerce Commission.

Another ground of defense is that the court below had no jurisdiction of the subject of the action, federal jurisdiction thereof being exclusive. We think this position would be correct if the action was based on any specific remedy given by the act of Congress, as under sections 8 and 9 thereof. Van Patton vs. Chicago M. & St. P. R. Co., 74 T. R. 981. But this action is not based on any right given by the federal statute, but on the common law right, of which

a state court does have jurisdiction, a right, we think, reserved to the shipper by section 22 of said act.

26 At another day, to-wit: At a Supreme Court of Appeals, continued and held at Charleston on the 9th day of November, A. D., 1908, the following order was made and entered of record *was made and entered of record* to-wit:

CLARENCE D. ROBINSON, Plaintiff Below, Plaintiff in Error,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, Defendant Below, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Marion County, Rendered on the 5th Day of July, 1907.

A petition for re-argument and re-hearing in this case was tendered in vacation on October 24, 1908, which petition is ordered to be docketed, and the judgment heretofore entered in this case on a former day of the present term, to-wit, on the 6th day of October, 1908, is hereby suspended until the further order of this Court.

At another day, to-wit: At a Supreme Court of Appeals, continued and held at Charleston on the 14th day of January, A. D., 1909, the following order was made and entered of record, to-wit:

* * * * * * *

CLARENCE D. ROBINSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

From Marion County.

The Court, having maturely considered the petitions for rehearing heretofore filed in the two foregoing cases, is of opinion to and doth hereby refuse the prayer of said petitions, and doth order that the judgments heretofore entered in the foregoing cases be made absolute and be severally certified as heretofore directed.

27 The petition for a rehearing referred to in the foregoing order is in words and figures as follows:

In the Supreme Court of Appeals of West Virginia, Charleston, West Virginia.

No. 983.

CLARENCE D. ROBINSON, Plaintiff Below, Plaintiff in Error,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, Defendant Below, Defendant in Error.

At Law.

Petition for Rehearing.

To the said Supreme Court:

The petition of Clarence D. Robinson, the above named plaintiff, respectfully represents that he is aggr-ived by the judgment and rulings entered by your Honor-ble Court in the above action, on the — day of October, 1908, affirming the judgment entered in said action by the Circuit Court of Marion County, West Virginia, from which court said action was appealed to your Honorable Court.

The petitioner is advised and alleges that the aforesaid judgment and rulings made and entered by the court in said action, is, and are, repugnant to the constitution of the United States; that the same is, and are, repugnant to an Act of Congress of February 4, 1887, and the several acts amendatory thereof, entitled "An act to regulate Commerce."

28 That the said judgement and rulings is, and are, repugnant to the constitution of West Virginia.

That the judgement of the Court is contrary to the law of said case.

Petitioner, therefor, prays that a rehearing of said action be granted him by your Honorable Court, that the aforesaid judgement entered by your Honorable Court, on the day and year aforesaid, in said action, affirming the judgement entered by the trial Court therein be set aside; that said action be reinstated upon the docket for further hearing; that all orders necessary for that purpose be made and entered herein.

CLARENCE D. ROBINSON.

Brief.

Referring to the opinion handed down by the court, we find: "1, until a schedule of rates filed and published by a common carrier, pursuant to the act of Congress, entitled "An Act to Regulate Commerce" has been by the Inter-State Commerce Commission declared excessive and unreasonable, a shipper cannot maintain an action at common law in a State Court to recover for the excess of freights exacted on inter-state shipments, if the rates charged were those fixed by the schedule," and point 2: "on the trial of such a com-

mon law action, the rates charged being according to such schedule, nothing but the evidence of a prior adjudication of the Interstate Commerce Commission that such rates are unreasonable and unjust will justify a judgment for the plaintiff."

The above syllabi are based on the decision of the U. S. Supreme Court, in the Texas, etc., Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426, which is the law of such cases there present. But our case is wholly different, and that law does not apply to it.

The question before the court in the Texas case was purely one of reasonable charges, and whether the court had the right to fix or declare what is a reasonable rate. This courts can not do independent of the action of the Interstate Commerce Commission; but our case is not one of "reasonableness of charges." We present the question of "discrimination in charges." The terms "unreasonableness of rate" and "unlawful discrimination in rates" are not synonymous. They do not mean the same thing, but wholly different things.

To illustrate: It may be "reasonable" to charge A $20.00 per
29 car to carry a car load of coal from Fairmont to Charleston; and, standing alone, the rate would be lawful. But, if the carrier carries B's coal from Fairmont to Charleston for $10.00 then the carrier is guilty of "unlawful discrimination" against A, although the rate charged A would be in itself reasonable." Now, Robinson is asking for judgment for *unlawful discrimination* against him. He is not asking that the court fix *"a reasonable rate."*

When your Honors cite the said case, 204, U. S., against us we must beg leave to correct you, praying your Honors' pardon for so doing. It seems that your Honors overlooked the point actually decided by the U. S. Supreme Court in that case. In that case that court simply passed on the right of a court to fix or declare what shall be a "reasonable charge or rate." As above stated, "unreasonableness of rates" and "unlawful discrimination of rates" are not synonymous. They are wholly different and are governed by different law and jurisdiction.

Fixing a schedule of reasonable rates is merely a supervising or administrative act which is alone cognizable by the Interstate Commerce Commission. Discrimination in rates is a question of law and fact and can be alone adjudicated by a court, judge and jury if demanded.

Now, let us more closely examine the Texas, etc., case 204 U. S., and see what was actually decided. It is true that the shipper in that case complained of "discrimination" as well as "unreasonable charges," but in the course of the trial the question of "discrimination" was eliminated and the sole question before the court was: Can a State Court make or order a schedule of "reasonable rates"? Turn to page 432 of that case and you will find this language by the court: "As nothing in the conclusions relates to the averments of discrimination, etc., those subjects, it may be assumed, were considered eliminated in the course of the trial." And on page 433 the court says: "The assigned errors are addressed *exclusively* to the operation of the act to regulate commerce upon the jurisdiction of the court below, and its power in any event to afford relief to the oil

company, *based upon alleged reasonableness of the rate under the circumstances disclosed.*" Now you see that that court passed solely on the rights of a State Court to fix a reasonable rate.

When the amendment to the Int. Com. Act was passed,
30 there was great confusion and inconsistency in rates because of the statutes of the different States. So that railroads could not obey one statute without violating the other, and national regulation became necessary. Therefore, power was conferred upon the commission, under the national statute, to supervise the making of schedule rates, a power not conferred upon the courts, so that a reasonable and uniform rate might be established. Now, note: the object of the statute was not to abolish the jurisdiction of the courts to try and determine a complaint and recovery of damages against a carrier caused by unlawful discrimination in rates; but to avoid the conflict of rates brought about by the various State statutes. Hence State courts, and even National courts, can not make schedules of reasonable rates. And this is what the U. S. Supreme Court in the oil company case, 204 U. S., decides. But, now, the question of the recovery of damages caused by discrimination in charges, presents a different question. That is a question of law and fact which can alone be tried in our established courts. The Int. Com. Com. has no such jurisdiction. It is not a court, and by the organic law of the land every citizen is entitled to have his cases tried in court. Our courts are, in fact, the very place provided by the constitution of State and Nation, for the adjudication of our grievances, but this privilege is denied us by your Honors' decision. We are told that before our complaint can be heard we must first ask the Int. Com. Com. to decide as to whether or not we have a cause of action when we claim damages based on unlawful discrimination, and that nothing but their decision will give us a standing in court. In other words, the effect of your Honors' decision is that our courts are no longer courts, wherein our rights against a railroad company, on such complaint can be adjudicated, for it must not be overlooked that the discrimination in rate is the very gist of the action.

Your Honors' decision, as applied to our case, would abolish the government itself. We have but three branches of government, legislative, executive and judicial. The Int. Com. Com. belongs to neither. It is not a court, possesses no governmental function. And not only are we entitled to be heard in court, but, by the constitution of State and Nation, when the amount in controversy exceeds $20.00, we are entitled to a trial by jury. How can we get a jury trial before the Int. Com. Com.? Now, if we can not be heard in court, and the Commission can not give us a
31 constitutional trial, where is the judicial department of our government?

The U. S. Court in the oil company case, 204, U. S. 426, cited by the court, does not mean that every action sounding in damages, because of discrimination, must be passed on by the Int. Com. — before our courts can give judgment for the plaintiff. Such powers could not be taken away from our courts, and conferred on the commission. Such a statute would be unconstitutional.

The fact that the defendant filed a schedule of rates with the commission, does not deprive us *from* our right to maintain our action, based on unlawful discrimination, but by filing it, and admitting it in the record, as they do, they prove our case.

It is not necessary in our case, as held by your Honors, to get a copy of the record of the Glade Coal Co. case, decided by the Int-Com. Comm. to maintain our action. This case is cited by us as a precedent, showing what the commission, in cases like ours, held to be *unlawful discrimination.*

The U. S. Sup. Court, in the Oil Co. case, cited by your Honors, agrees with us as to the right to maintain damage suits, under the Int. Com. Act. Note what that Court says at page 439: "And by sec. 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies are saved." Our case comes under this provision. We, also, desire to make a slight correction of the Court's opinion as to the necessary proof.

We think the Court agrees with us that a prima facie case is made out when the discrimination is proved, but, the court says: "a different rule was applied, however in Western Union, etc., vs. Call. Pub. Co." The rule applied there does not contradict our assertion. That case proceeded under a different rule, it is true; but, in that case the discrimination was not admitted; and, therefore it becomes necessary to prove it. Of course, if the defendant, in our case, had introduced evidence to justify the discrimination, then it would have been necessary for us to rebut it; but that necessity did not arise.

Again, admitting as claimed that we must first get the ruling of the Int. Com Com. on the question of discrimination as well as unreasonable rates before our action can be maintained, then still we are entitled to recovery, for as has been shown by our former briefs, as the court is aware, the commission found this very schedule of rates about which we complain unlawful and abolished it. Now,
32 we note that the court says it cannot take judicial notice of their (Int. Com. Com.) records and proceedings. * * * There are few, if any, instances in which they will take judicial notice, except as precedents of the decisions in other courts in other causes." Citing Elliot & 19 Grats. Then you continue: "It is true of course, as of public statutes of another State, that the courts of one State, the records thereof being produced, will take judicial notice of the legal effect of a judgment or decree of a court of another State." All this law has no application now. Whatever courts may have done with the decisions of the Int. Com. Com. prior to the Amendment of the Int. Com. Act, which amendment is known as the Elkins Act, matters nothing now on the question of the fixing of rates.

Since the passage of that act, the commission, on the fixing of rates, occupies a different position before the public than it had prior thereto, as per the opinion of the U. S. Sup. Court, 204, U. S. p. 426, cited by your Honors. Nor is the United States a foreign State to West Virginia. The U. S. Government; the constitution and all laws thereof, are in West Virginia, and are the supreme law

of the land. The Int. Com. Act, and all its provisions, is a public law and applies to all courts and citizens, throughout the United States. The aforesaid amendment to the Int. Com. Act, is therefore a public law fixing rates. True, Congress did not directly fix the sums to be charged as freight; but by its provisions, the commission does: and its action therein is binding on the public as a part of the act itself.

The Commission's action in this respect, is a part of a public law establishing rates, published through their reports, binding upon all men within the jurisdiction of the United States. It is absurd to say that all shippers and carriers are bound by the finding of the Commission, as a part of the law obtained through their official reports, but that courts are not. How can Robinson add anything to the action of the Commission making rates, by filing a copy thereof with his complaint, such finding of the Commission being an established legal factor on freight charges throughout the United States? And your Honors are in possession of this law.

Respectfully submitted,

C. H. LEEDS,
Att'y for P. E.

33 At another day, to-wit: At a Supreme Court of Appeals, continued and held at Charleston, on the 27th day of January, A. D., 1909, the following order was made and entered of record, to-wit:

CLARENCE D. ROBINSON, Plaintiff Below, Plaintiff in Error,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, Defendant Below, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Marion County Rendered on the 5th Day of July, 1907.

The plaintiff in error stating that he desires to present a petition to the Supreme Court of the United States for a writ of error to the judgment rendered in this case on the 6th day of October, 1908, on his motion, it is ordered that the execution of the said judgment be suspended for ninety days after the 12th day of January, 1909, provided bond be given before the Clerk of this Court or before the Clerk of the Circuit Court of Marion County in the penalty of one hundred dollars, with good security, with condition as set forth in the Code of 1899, Chapter 135, Section 30.

MEMO.—The stay bond executed pursuant to the foregoing order was filed in the office of the Clerk of the said Supreme Court of Appeals, on the 3rd day of February, 1909.

34 *Certificate.*

STATE OF WEST VIRGINIA, *To wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do certify that the foregoing is a true copy and transcript of the record and filings in the case of Clarence D. Robinson *versus* Baltimore & Ohio Railroad Company, No. 983, from the Circuit Court of Marion County and lately pending in said Supreme Court of Appeals, and now of record and on file in my office.

In witness whereof, I have hereto set my hand and seal of the said Supreme Court of Appeals, at Charleston, this 6th day of February, 1909, and in the 46th year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS, *Clerk.*

35 Supreme Court of West Virginia.

No. 983.

CLARENCE D. ROBINSON, Plaintiff, P. E.,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant, D. E.

Assignment of Error.

To the Honorable Supreme Court of the United States:

Now comes the plaintiff and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

The Supreme Court of West Virginia erred in holding and deciding,—*a:* that it could not adjudicate the claim of the plaintiff in this action without the previous adjudication of the right claimed therein by the Interstate Commerce Commission;—*b:* and that such previous adjudication by the commission must be proved by the record.

The said errors are more particularly set forth as follows:

The Supreme Court of West Virginia erred in holding and deciding, First: that "Until a schedule of rates filed and entitled 'An Act to Regulate' has been by the Interstate Commerce Commission declared excessive and unreasonable, a shipper cannot maintain an action at common law in a state court to recover for the excess of freights exacted on interstate shipments, if the rates charged were those fixed by the schedule," is the law of this case.

Second. The court erred in holding and deciding that on the trial of such a common law action, the rates charged being accord-

ing to such schedules nothing but the evidence of a prior adjudication of the Interstate Commerce Commission that such rates are unreasonable and unjust will justify a judgment for the
36 plaintiff, in this action.

Third. The court erred in holding and deciding that it could not render judgment for the plaintiff in this action in the absence of a previous adjudication of our claim and complaint by the Interstate Commerce Commission.

Fourth. The court erred in denying plaintiff right to maintain this action in our state court, such right having been especially claimed by the plaintiff under section 22 of the Act of Congress of Feb. 4, 1887, entitled "An Act to Regulate Commerce."

Fifth. The court erred in holding and deciding that the judgment by it rendered, herein, is not repugnant to the Constitution of the United States.

Sixth. The court erred in holding and deciding that the said judgment is not repugnant to an act of Congress of Feb. 4, 1887, and the several acts amendatory thereof, entitled "An Act to Regulate Commerce."

The court erred in its judgment.

For these and other errors, the plaintiff, the said Clarence D. Robinson, prays that said final judgment of the Supreme Court of the State of West Virginia, dated the 6th day of October, 1908, and made absolute on the 14th day of January, 1909, be reversed and a judgment rendered in favor of the plaintiff and for costs.

CHARLES H. LEEDS,
Attorney for Plaintiff.

37 CLARENCE D. ROBINSON, Plaintiff, P. E.,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant, D. E.

Petition for Writ of Error.

To the Honorable Supreme Court of the United States:

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a Supersedeas bond.

Assignment of errors herewith:

CHARLES H. LEEDS,
Attorney for Plaintiff.

WASHINGTON, D. C.,
CHIEF JUSTICE'S CHAMBERS,
FEB. 18TH, 1909.

Writ of error granted on petitioner filing bond in the sum of five hundred dollars, conditioned according to law and approved by the

Clerk of the Supreme Court of the United States, and to operate as a supersedeas.

MELVILLE W. FULLER,
Chief Justice of the United States.

38 Know All Men by these Presents, That we, Clarence D. Robinson of Fairmont, West Virginia, as principal, and Clyde S. Holt, A. L. Lehman and J. L. Hall of said city and state, as sureties, are held and firmly bound unto The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland, United States of America, in the full and just sum of Five Hundred dollars, to be paid to the said Baltimore and Ohio Railroad Company certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 19th day of February, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Supreme Court of West Virginia, held at Charleston, State of West Virginia, in a suit depending in said Court, between said Clarence D. Robinson, plaintiff, and The Baltimore and Ohio Railroad Company, a corporation, defendant, a final judgment was rendered against the said Clarence D. Robinson, and the said Clarence D. Robinson having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Baltimore and Ohio Railroad Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Clarence D. Robinson shall prosecute his said Writ of Error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

39 CLARENCE D. ROBINSON. [SEAL.]
CLYDE S. HOLT. [SEAL.]
A. L. LEHMAN. [SEAL.]
J. L. HALL. [SEAL.]

Sealed and delivered in presence of—
W. T. ROWLEY,
JOHN L. LEHMAN,
EARLE L. DANCER.

UNITED STATES OF AMERICA,
Northern District of West Virgina, ss:

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, do hereby certify that in my opinion, founded on information from reputable and responsible persons, that the principal, Clarence D. Robinson, and the sureties, Clyde S. Holt, A. L. Lehman and J. L. Hall on the within bond in the case of Clarence D. Robinson, against the Baltimore and Ohio

Railroad Company depending in the Supreme Court of the State of West Virginia, is good and abundantly sufficient for the purpose for which it is executed.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at the City of Clarksburg, in said District this 20th day of February, 1909.

[SEAL.]

S. R. HARRISON,
Clerk, C. C. U. N. S. N. D. W. Va.

Approved by
JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States, as per order of the Chief Justice of the U. S.

A true copy.
Attest:

WM. B. MATHEWS,
Clerk Supreme Court of Appeals of W. Va.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Clarence D. Robinson, plaintiff in error, and The Baltimore & Ohio Railroad Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
41 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within

thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-third day of February, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
MELVILLE W. FULLER,
Chief Justice of the United States.

42 STATE OF WEST VIRGINIA, *To-wit:*

I, W. B. Mathews, Clerk Supreme Court of Appeals of West Virginia, do hereby certify that the original bond of which a copy is attached and included in the foregoing papers and a copy of the writ of error allowed in this case by the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States have been lodged this day in my office as said Clerk.

Given under my hand this 2nd day of March, 1909.

WM. B. MATHEWS, *Clerk.*

43 UNITED STATES OF AMERICA, *ss:*

To the Baltimore & Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of the State of West Virginia wherein Clarence D. Robinson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-third day of February, in the year of our Lord one thousand nine hundred and nine.

MELVILLE W. FULLER,
Chief Justice of the United States.

43½ Received this writ at Parkersburg, West Virginia, February 27th, 1909. Executed the same, February 27, 1909, at Parkersburg, West Virginia, upon the Baltimore & Ohio Railroad Company, by delivering to F. A. Carpenter, its agent at Parkersburg, W. Va., in person, a duly certified copy thereof; at the time of service he being resident of the city of Parkersburg, County of Wood and state aforesaid.

No President or Vice President or other officer being found in my district upon whom service could be made.

C. D. ELLIOTT,
United States Marshal Northern Dist.,
West Virginia,
Per HAL M. RAPP,
Office Deputy.

Marshal's Fees, $2.00.

44 UNITED STATES OF AMERICA,
Supreme Court of West Virginia, To-wit:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case and all things concerning same.

In witness whereof, I hereby subscribe my name and affix the seal of said Supreme Court, in the city of Charleston, this 8th day of March, 1909; and in the 46th year of the state.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals
of West Virginia.

45 *Taxation of Costs.*

In The Supreme Court of Appeals of West Virginia.

CLARENCE D. ROBINSON, P. E.,
vs.
BALTO. & OHIO RAILROAD CO., D. E.

Affirmed, October 6, 1908.

Plaintiff in error's Costs:

Clerk	$4.55
Printing Record	13.50
Clerk of Circuit Court for Transcript	3.50
Sheriff H. R. Furbee, serving process	.75
Sheriff serving notice	....
Cost of Transcript of record in the Supreme Court	10.50
Attorney	....
Total, Paid by P. E.	32.80

Defendant in Error's Costs:

Clerk	4.30
Printing Record	....
Clerk of Circuit Court—supp'l Transcript	....
Sheriff serving notice	....
Damages, Code Chap. 135, Sec. 27	30.00
Attorney	30.00
Total	....

Attest:

WM. B. MATHEWS, *Clerk.*

[Endorsed:] Error to the Supreme Court of Appeals of West Virginia, Marion County. Robinson vs. Railroad Co. No. 983.

Endorsed on cover: File No. 21,550. West Virginia Supreme Court of Appeals. Term No. 170. Clarence D. Robinson, plaintiff in error, vs. The Baltimore & Ohio Railroad Company. Filed March 15th, 1909. File No. 21,550.

Office Supreme Court U. S.
FILED
MAR 4 1911
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, [redacted]

NO. [redacted]17

CLARENCE D. ROBINSON, P. E.

VS.

BALTIMORE AND OHIO RAILROAD COMPANY, D. E.

IN ERROR TO THE SUPREME COURT OF WEST VIRGINIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States

OCTOBER TERM, 1910.

CLARENCE D. ROBINSON, P. E.

VS.

BALTIMORE AND OHIO RAILROAD COMPANY, D. E.

IN ERROR TO THE SUPREME COURT OF WEST VIRGINIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

This action was brought by the plaintiff, Clarence D. Robinson, against the said defendant in error, in the Circuit Court of Marion County, W. Va., to recover the sum of $150.00 damages sustained by the plaintiff by reason of a discrimination against him, by the carrier, on interstate shipments. A statement of these shipments is found on pages 5 and 6 of the record. Robinson was a small shipper of coal, loading his coal into the carriers cars from wagons.

The discrimination consisted in compelling Robinson to pay fifty cents per ton in addition to the freight rate.

To this effect the defendant had published a schedule of rates and filed a copy thereof with the Interstate Commerce Commission. This schedule was in force when the plaintiff's coal was shipped. For a full statement of the facts, see pages 7 to 10 in the record. Upon examination of the facts, it will be observed that the discrimination is admitted; that the carrier compelled us to pay the additional amount is admitted; that the additional amount, $150.00, was by the defendant collected from the plaintiff, is admitted; that the additional charge is not based on any additional service, cost, expense or

burden, is admitted; that the commodity is the same, is admitted; that the additional charge is not for demurrage or delay, is admitted; in short, that the carrier was circumstanced in our shipments precisely the same as in the shipments of coals carried for the larger shipper whose coal was carried at the regular rate is admitted.

And this fifty cents per ton is not in reality a freightage charge, as it is not based on any service rendered. Whether we shipped one mile or ~~the~~ thousand or ANY NUMBER OF MILES, the additional fifty cents per ton was the same; and the carrier did not permit the additional moneys to be returned as freight tariff. The defendant, the initial carrier, had instructed its agents to deduct this additional charge from the freightage paid before pro-rating with the connecting carriers and add the same to the proportion of the B. & O. and to mark such shipments "loaded from wagons."

That it was a clear case of unlawful discrimination, is not denied. The defendant, itself, does not undertake to justify it, or claim that it had the right to charge it.

The State Court clearly indicates in its opinion that it considered the additional charge unlawful; but the Court claimed that our case comes under the Rule declared in the case of Texas, etc., Ry. vs. Abiline Oil Co., 204 U. S., page 426, and that under that Rule we must "fail for want of legal proof." See the State Court's opinion on page 15 of the record.

ARGUMENT.

We think the State Court erred as to the law of this case. It will be noted that the State Court takes the said Texas case, 204 U. S., page 426, as the basis for its decision. Now, we claim,

First: That our case does not come under the Rule declared in said Texas case, 204, U. S., page 426.

Second: That if our case does come under the Rule of said Texas case, that, then, we have the right to recover.

As to the first proposition, we affirm that the Court did not in said Texas case (204 U. S.) decide the question involved in the case at bar.

In that case the question was, exclusively, as to whether or not a State Court can decide what is a reasonable rate. In

the case at bar, the question is: Can the carrier charge fifty cents, or an additional amount, to the rate in the absence of any circumstance that justifies the additional charge? Purely a question of law.

A careful reading of the case (204 U. S.) shows that the Court was specially careful to make it clear that it was passing EXCLUSIVELY, on the right of a State Court to make REASONABLE RATES ON INTER-STATE FREIGHTS; and that it was NOT deciding the right of a shipper to recover damages because of a discrimination in charges. There is a vast difference between the two propositions. Rate making is a legislative and administrative act; but the recovery of damages because of a discrimination presents a question of law and fact to be tried by the courts, not by the Commission, because such a question is judicial. We insist that the Rule in the Texas case (204 U. S.) does not determine the issues in the case at bar.

It must be remembered that we did not ask the court to change the rate on our freight from Fairmont, West Virginia, the point of shipment, to the points of destination in Illinois, New Jersey and Pennsylvania, as was done in the said Texas case. In our case the rate was made, made by the defendant, itself, and we do not ask the court to change it. For the purpose of our case, it is wholly immaterial what the rate was, as there was no dispute over the reasonableness, or lawfulness of the regularly established rate. The plaintiff simply claimed that he had the right to recover the amount of the additional charge ($150.00) unless the defendant could show some fact or circumstance that justified it in making this additional charge. This is purely a legal question for the courts to decide, because it is judicial; it is not legislative or administrative to be acted on by the Inter State Commerce Commission to the exclusion of the courts, as claimed by our state court. And, now, we wish to emphasize the fact that the question submitted to the court was exclusively a question of law and nothing else. There was no dispute about the facts, as the facts were agreed upon, in writing, and submitted to the court. See the agreed statement of the facts on pages 7 to 10 in the record. This left nothing to be decided except the LAW ON THE CASE, which every American citizen, by the organic law of

the land, has the right to have determined by the courts. Our courts are, in fact, the very place provided, by the constitution of the state and nation, for the determination of our legal rights; but this privilege is denied us by the State Court's decision. And COURTS do not include the Inter-state Commerce Commission; it is not a court. By what authority can the Inter-state Commerce Commission expound the law of the land? The Congress never undertook to confer such power upon the Commission, nor could it do so if it desired; such a statute would be unconstitutional. And this is to the point, the issue; because the law on the case was the only question to be decided in the case at bar. As our State Court construes and applies the law, to our case, it would abolish the judicial department of our government. No lawyer will claim that the Inter-state Commerce Commission can decide the law of the land and, now, if the commission can not render judgement on the law, and, if we can not be heard in the court, as our State Court claims, where is the judicial department of our government? We repeat, our State Court was wholly in error in applying the rule in the Texas case, 204 U. S., to our case. Furthermore, the State Court decision is repugnant to the constitution of the United States (one of the assignments of error), for, if "due process of law" and "the law of the land" means anything, it means the right to be fully heard in our courts. The right asserted here can not be denied, neither by the bench nor by the legislative department, for it is included in that which is organic.

Now, as to our second proposition, to-wit: That if our case does come under the rule of the Texas case, (204 U. S.), then we have the right to recover. The State Court states the rule as follows: Until a schedule of rates filed and published by a common carrier, pursuant to the act of Congress entitled "An Act to Regulate Commerce," has been by the Inter-state Commerce commission declared excessive and unreasonable, a shipper cannot maintain an action at common law in a state court to recover for the excess of freights exacted on interstate shipments if the rates charged were those fixed by such schedule; that "nothing but the evidence of a prior adjudication of the Interstate Commerce Commission that such rates are unreasonable and unjust will justify a judgment for the plain-

tiff," and that "the court on such trial will not take judicial notice of such prior adjudication by the Interstate Commerce Commission, but if relied on by the plaintiff, THE SAME MUST BE PROVEN BY THE RECORD." See the Court's opinion on page 12 of the record. Now, admitting for the sake of the argument that our case does come under the aforesaid rule, then our State Court erred, nevertheless, as to the law of our case. It will be observed that under the rule we are simply precluded from recovering in a State Court so long as the Interstate Commerce Commission has not declared the schedule unlawful, but, after the Commission has declared the rate or charges unlawful, then we can recover in a State Court. And the decision of the United States Supreme Court, in the Texas case, 204 U. S. page 426, gives us the right to recover in a State Court, after the Commission has declared a freight tariff, or rate, unreasonable or unlawful. Now, adopting the rule, Robinson, plaintiff, had the right to recover, because the Commission had declared the additional charge in this very same schedule about which we complain unreasonable, unlawful and unjust, and ordered the same abolished BEFORE we brought this suit. See Glade Coal Company vs. Baltimore & Ohio Railroad Company, 10 I. C. C. Rep. 224, April, 1904. This decision and rule of the commission was submitted, with our case, to the trial court and to the Supreme Court of our State, which is admitted by the Court. See the Court's opinion pages 13-15 of the record. So that we had the very thing (the decision of the Commission on the schedule of rates prior to the bringing of this suit) which the court said was necessary to justify a judgment for the plaintiff. But then the Court rejected the decision of the Commission, abolising said schedule in said Glade Coal Company case, claiming that such decision would have to be proved "by the record thereof." The Court, of course, means by this that we must get an authenticated copy of the record of the Glade Coal Co. case, decided by the Commission, and ask that it be received in evidence before it would be considered by the court. Here, again, our State Court failed, because the late amendment to the Interstate Commerce Act makes the decisions of the Commission binding on "all courts," when published in the manner provided by the

Commission, "without further proof or authentication thereof." The statute reads: "The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof." (Interstate Commerce Act, as amended by Act of June 29, 1906, section 3.)

This amendment changes the status of the Commission before the country and our courts. It is no longer necessary to get the private, authenticated record of the decision of the Commission, in some particular case, as proof, for the *published* decision of the Commission, in manner provided by it, is sufficient. This is the express language of the State. We need not ask the courts that such publications of the decisions of the Commission be accepted as evidence for they are evidence by virtue of the statute. All we need do is to produce the decision of the Commission as contained in the reports.

Now, our court admits that we did produce the decision of the Commission adjudicating said schedule unlawful, to-wit: 10 I. C. C. Rep. 224. See the Court's opinion at page 13 and 15 of the record. The said decision of the Commission was, therefore, presented to the courts, Circuit and Appellate, as a part of our case, in the published Reports, it is true, but this was all the statute required us to do.

The State Court's decision abolishes the said Amendment, for it denies the use of the very thing the Amendment was intended to establish.

The Court's decision would leave the public absolutely at the mercy of railroad companies, for if each individual complaint, arising from ocean to ocean and from the Dominion to Mexico, would have to be supported by private record of the decisions of the Commission adjudicating each particular form of grievence, it would be impossible to administer justice. The Commission would be overpowered; and the remedy, even if accessible, would incur greater loss, in many cases, than the the injury.

When the Congress empowered the Commission to supervise the matter of rates, it foresaw the necessity of enacting a law by which the decisions of the Commission shall be published "for public information and use," and this not only as between shipper and carrier, but, also, "in all courts of the United States and of the several States without any further proof or authentication thereof." This was accomplished by the enactment of the aforesaid Amendment. But our State Court's decision being the express contrary of the statute, sustains our assignment of error on this point, to-wit: "The Court erred in holding and deciding that the said judgment is not repugnant to an act of Congress of Feb. 4, 1887, and the several acts amendatory thereof, entitled an Act to Regulate Commerce, another of the assignments of error.

The third particular assignment of error is, also, fully sustained by the foregoing argument, for the reason that Court's decision denies us the "use," as "evidence" of the "published" "decision" of the Interstate Commerce Commission in the Glade Coal Co., 10 Int. C. C. Rep., which by virtue of the statute was Legal Evidence, but which the Court said is not "Legal Proof." In other words it was not necessary to ask the Commission to again adjudicate the said schedule in our case, as the Commission had adjudicated it unlawful and unreasonable, etc. Therefore, had the court accepted the said decision as evidence, in accordance with the statute, it could, and should, have rendered judgment for the plaintiff.

We deem it unnecessary to argue the case more in detail. It is clear that the Court erred and the errors are sufficiently assigned.

Respectfuly submitted,

CHARLES H. LEEDS.

January 11, 1911.

3

Office Supreme Court, U. S.
FILED.
MAY 8 1911
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

No. [redacted]17

CLARENCE D. ROBINSON, Plaintiff in Error.

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant in Error.

BRIEF IN REPLY TO BRIEF FILED BY THE DEFENDANT IN ERROR.

REPLY BRIEF.

In the Supreme Court of the United States

CLARENCE D. ROBINSON, Plaintiff in Error.

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant in Error.

BRIEF IN REPLY TO BRIEF FILED BY THE DEFENDANT IN ERROR.

Counsel for defendant in error seek to defeat our right to recover in your Hoonrable Court on two points, to-wit: The first point is:

The Inter-State Commerce Commission alone has original jurisdiction of suits brought by shippers to recover unreasonable freight rate charges exacted by carriers on Inter-State shipments.

Their second point is, to-wit:

Even if proposition one be unsound, there is no evidence of a previous adjudication by the Commission.

Both propositions advanced by the defendant, with the reference to the case at bar, are unsound.

It is evident that the defendant has undertaken, by specious argument, to crowd the present case under the rule of the Abaline Oil Company Case, 204 U. S., p. 426; and they further cite Southern Railroad Company case, 206 U. S., p. 428; The Pitcairn case, 215 U. S., p. 481; but neither of these cases applies to the case we present.

Counsel for defendant in error fail to note the distinction, which in justice to the plaintiff in error, must be made

between the case at bar and the cases, aforesaid, by them cited. They make a very labored effort to hold the present case under the aforesaid Texas case, 204 U. S., 426, showing clearly that they believed that case to be their only hope to defeat our action in your Honor's court; but, among other differences, the following distinctions must be made, to-wit: That in the said Abaline case the question of the right of a State court, since the late enactments of Congress relating to Inter-state Commerce, to make or declare what shall constitute a reasonable rate was the exact question presented, while in our case we present no such question, but we present the question of the right of a Railroad Company to discriminate against us without respect of the rate established by the Company, itself, on the goods transported by them for us, and the further difference that in the Texas case the Inter-state Commerce Commission had made no adjudication of the rate in question, but in our case the Inter-state Commerce Commission had passed on the schedule, about which we complain, and declared the same unlawful, in the Glade Coal Company case, 10 Inter-state Commerce Commission Reports, before we brought this suit. So that from every phase of the case our status before the Courts, under the decision of your Honor's court, and the Enactments of Congress, is different from that in the Abaline case, 204 U. S. In that case the Abaline Oil Company undertook to have a State court make a reasonable rate in advance of the action of the Inte-state Commerce Commission. In the case at bar, as matter of fact, we do not ask the Court to say what shall constitute a reasonable rate on the shipments in question, but are asking to recover amount exacted from us independent of the rate established by the carrier and which amount it is admitted by the carrier was exacted in addition to the rate, with the further distinction, from said Texas case, that the Inter-state Commerce Commission had declared this said additional charge, the said schedule, so far as the fifty cents additional are concerned, and abolish the same before we brought this suit. This distinction is important, because if it can be held in this case that it was necessary for the Commission to pass on the schedule before we could maintain our

action, then we had such decision from the Commission before the institution of our action, while in the said Abaline case, plaintiff did not have such action of the Commission, and further in the said case, 204 U. S., the Court makes it clear that after such action of the Commission a shipper can maintain an action in a State court on the complaint such as we present and the Supreme Court of West Virginia impliededly held the same thing, which is admitted by the defendant in error. But we insist that the defendant in error cannot show from the record that we are asking the Court to say what shall constitute a reasonable rate on the shipments of coal made by us between Fairmont, West Virginia, to the points in Illinois, New Jersey and Pennsylvania to which our coal was shipped, this distinction should be observed because it makes a great difference in the law applicable to the different cases under consideration. Specifically, our case involves the fundamental right of every citizen to patronize the railroads on equal terms, and these terms mean that we had the right to ship our traffic on the same rates charged other shippers, shipping the same commodity, unless the carrier could show some reason justifying the discrimination complained of, against us. This is therefore not a question of reasonable rates but of the fundamental right, guaranteed to shippers to use railroads as a public highway, and as to whether or not a railroad company can by the mere fact of filing an unlawful schedule with the Inter-state Commerce Commission avoid the duty it owes to the public. We insist that they cannot. Our right in the premises, to-wit: to patronize the railroad on equal terms with other shippers would remain irrespective of any action of the Inter-state Commerce Commission. As aforesaid this right is fundamental. As expressed by the Supreme Court of the United States in Western Union Telegraph Company vs. Call Publishing Company, 181 U. S., p. 92, Law edition 45, p. 765 "Common Carriers, whether engaged in Inter-state commerce or in that wholly within the State, our preforming a public service. They are endowed with some of its sovereign power such as the right of Eminent Domain, and so endowed by reason of the public service they render.

As a consequence of this all individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent difference in the mode and kinds of service and difference in charges based thereon * * * * * * But that principal of equality does forbid any difference in charges which is not based upon difference in service and even when based on difference in service must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exist under which common carriers anywhere in the Country, engaged in any form of transportation are relieved from the burdens of these obligations is a proposition, to say the least, is startling." This is precisely the obligation which the railroad company undertook to avoid in our case. It will be noted, from the record that the carrier made the discrimination without even a pretense of justification or claim of any service rendered whatever and denied us the right to use their railroad on terms guaranteed to us by the law of the land. Here we wish to say that this right is so fundamental that any order the Inter-state Commerce Commission might have rendered with respect to the shipments in question could not have denied us the right to be heard in our Court, because, as said in our brief in chief, it is a legal question which we have the right to bring to our Courts and no power can deny our right in Courts.

Returning specifically to the character of discrimination we wish especially to note that counsel for defendant wholly overlooked the case at bar, because the additional charge made against us was made by the Company irrespective of the rates and because of the mere fact that we were team-track shippers. We especially invite the Court's attention to this point and Your Honor will observe that the defendant carrier did not regard it as a matter of freight charges, because they did not permit it ~~to be~~ (additional charge) to be returned in the freight charges. They had instructed their agents to withhold it from the freight income before pro-rating with connecting carriers and to mark all such shipments "Loaded from wagon." Here then the carrier, itself, tells us why they compelled us to

pay this additional amount, to-wit: because "We loaded from wagon." It is wholly unnecessary to argue as a legal proposition that the Company had no right to make us pay for the mere manner of loading our coal into its cars. And as aforesaid if the case can be considered as requiring the action of the Inter-state Commerce Commission to determine the question, before we could maintain our action in a State court, then we had it in the said Glade Coal Company case, 10 Inter-state Commerce Commission Reports, at page 226. The Commission there said making certain charges for the transportation of coal shipped in car loads when the coal is loaded by tippel and exacting a higher charge when it is loaded in some other way and for that reason, is not justified by difference in costs to the carrier between methods of loading, or by other facts appearing in this case and renders the higher rates thus made unreasonable and unduly discriminatory, first, as against complaints, and second, *as against all other shippers of coal* except those who load by tippel and constitutes a violation of Sections 1 and 3 of said act.

Counsel for defendant undertake to say that the Commission did not abolish the schedule complained of with reference to shippers in West Virginia. They say that the order of the Commission abolishing said schedule, and Your Honors will note that it is the indentical same schedule about which we complain, in the Glade Coal Company case applied only as to the Glade Coal Company. They further say that the conditions in West Virginia differ from the conditions in Pennsylvania. Here the counsel overlooked their case entirely, for it must be remembered that the difference in charge was not made because of difference in conditions, but for the same, identical, reason in West Virginia as in Pennsylvania, to-wit: "Loaded from wagon," and the Commission abolished the schedule as to ALL shippers loading by wagon—not merely as to the Glade Coal Company.

The further observation, Counsel insist that the order of the Commission abolishing a schedule relates only to each particular shipper and to support this argument they say,

that to permit action to be maintained in State Courts, although the Commission had decided against a particular schedule, by different shippers, such procedure would breed one of the worst evils the act attempted to correct, the ~~veil~~ evil of discrimination. Defendant's argument is against the law and is destroyed by its own logic, for if the ruling of the Inter-state Commerce Commission has no application to shippers other than the first litigant, then the *discrimination would have to continue as to all other shippers.* In other words the ruling of the Commission on a particular schedule would have no effect as to the public. Each shipper would have to get the identical same schedule decided as to himself. Finally this would result in having no schedule at all, but a rate would have to be made for each particular shipper in the United States. The absurdity of the argument of the defendant is to plain for further consideration. Why should each shipper, be required to go the Inter-state Commerce Commission? If he holds that each shipper must do so, then the logic is that shippers must ask the Commission to abolish, as in this case they had done, the same schedule though they might have abolished such schedule a thousand or any number of times previous. The discrimination continuing, what would become of the uniformity of rates under such a system, for which counsel for defendant, hypocritically, contend? The counsel for defendant falls into his error because he overlooks the case he presents and the distinction which must be made between this case and the other cases he cites.

Defendant's counsel cite the case of B. & O. vs. U. S. Ex. rel. Pitcairn Coal Company, 215 U. S., 481, as authority to sustain his argument, here again they fail for the reason that in that case the question was a matter of distribution of cars, a matter "Not previously passed on by the Commission," and was not a question of additional charge to the regular rate. This presents a different status as to the litigants before the Courts.

Counsel for defendant quote from 204 U. S., the said Abaline case, wherein your Honorable court held that the

action at common law could not be maintained in a State court in advance of an adjudication of a schedule or rate by the Commission; but the counsel overlooked that the ruling of the Court in that case cannot be applied to our case because of the distinction which Your Honor's ruling required, to-wit: in the Texas case there had been no previous adjudication by the Commission whilst in our case we have had the previous adjudication by the Commission. Hence, in our case such action was properly bought.

Counsel for defendant say that no reparation was allowed to the Glade Coal Company in that case, 10 I. C. 226. Here counsel again are in error. The Commission in that case did allow reparation in so far as the fifty cents additional is concerned. They said: "Defendants subjected complainants to undue and unreasonable prejudice and disadvantage and gave to such competitors undue and unreasonable preference and advantage, in violation of Section 3 of the act, and should be required to compensate complainants for the damage they suffered in consequence of such refusal, which, as stated in the findings of fact, is fifty cents per ton on 193 tons of coal, or the sum of $96.50." And in the conclusion of the case the Commission said "An order in accordance with the views herein expressed will be made." So that the argument of counsel for defendant on page 8, of their brief, as to this point is, also, erroneous. The Commission did allow reparation.

Counsel for defendant undertakes to make some criticism on our petition for re-hearing to the Supreme Court of West Virginia and quotes the following, "It is not necessary in our case as held by Your Honors, to get a copy of the record of the Glade Coal Company case decided by the Inter-state Commerce Commission, to maintain our case. This case is cited by us as a precedent, showing what the Commission in cases like ours held to be unlawful discrimination." The counsel failed to observe the point in which that remark was made: it was made with reference to the first division in our argument, which was based on the fundamental right as herein previously pointed out. Had counsel more carefully examined

our brief he would have noted that the argument to the Supreme Court of West Virginia was divided in the same manner that our argument is divided in our brief in chief to Your Honor's court: and in the later part of the argument to the Supreme Court of West Virginia we did insist on the right to use the decision of the Inter-state Commerce Commission, in said Glade Coal Company case, as evidence on the question of rates, if the Court should hold that this was a question of rates or the right of a State court to pass on rates after the Commission had decided the question of rates, which is in accordance with Your Honor's decision in said Abaline case, 204 U. S.

The second point of counsel for defendant is found on page 12 of their brief, to-wit:

"Even if proposition one be unsound, there is no evidence of a previous adjudication by the Commission."

This point is fully answered in our brief in chief wherein we have shown that the Congress had made the decisions of the Commission in their published reports evidence in all Courts, National and State, and that we are not required to furnish a copy of the record in any particular case, as held by our State court and Counsel for defendant to maintain our suit. That law had been enacted before we had instituted our suit in the State court. Counsel claim that the decision of the commission, abolishing said schedule, should have been included in our agreed statement of facts. Such argument is wholly untenable. The ruling of the Commission constituted no part of the facts in our shipment. Such ruling of the Commission was a matter to be adduced to the Court by producing the authorized publication thereof, "published in manner provided by the Commission." This is the only authorative way to prove it. The Court could not assume, from the mere agreement of parties, that the Commission had abolished the schedule. The statute in terms demands the production of the ruling of the Commission by producing its authorized publication, which we did to both the State courts. And suppose we could not have

agreed on the point, how would the Court determined the matter except by consulting the proper authority.

Whether we had agreed or not agreed, it would not have changed the fact that the Commission had adjudicated and abolished this very schedule, and this adjudication was legal evidence by virtue of the said enactment of Congress; and the law of the land prevails whether the litigants agree to it or not. The Court had no right to deny us the use of that decision, because the Congress enacted that we had the right to use it in a State Court. But I further observe that we would have had the right to use that decision of the Commission (abolishing the schedule in question), even though the Congress had never enacted the said amendment, allow such decision of the Commission as evidence, for if it is true that the Commission has the right, and does declare what shall constitute a reasonable rate, and that carriers and shippers are governed by their regulations and rules as a matter of law, then it necessarily follows that we would have the right to adduce their rulings to the Court, in proper cases, as we would the law of the case. It would be an absolute absurdity for the Courts to hold that we are governed by some rule of conduct as members of society and yet hold that that rule of conduct should be denied us in, or by our Courts. Our state Court, as well as counsel for defendant seem to have wholly failed to comprehend the object of the enactments of Congress to regulate the matter of Inter-State Commerce. If our State court's contention, and that of counsel for defendant, were maintained, then the enactments of Congress would fail entirely of the object intended thereby. There would be no uniformity of rates; no way whatever for the public to ascertain what rates they should be required to pay. The public would never know the law pertaining to rates. Railroad companies would have no restrictions and the public would be at their mercy. It is clair that defendants first try to evade the law enacted by Congress, by distorting the enactments of Congress to such an extent that the ruling of the Commission could not apply to the general public (which they do in the

fact that they claim that there must be a separate ruling by the Commission for each individual shipper throughout the United States), thus there could be no schedule, or law, or standard of rates. SECOND: Fearing that their first proposition is "Unsound" (Which they, themselves say in their brief) they undertake to destroy the rulings of the Commission on rates as evidence in our Courts which the Congress has said shall be evidence "In all Courts of the United States and of the several States without further proof or authentication thereof when published in manner provided by the Commission." The record shows that we had availed ourselves of the benefit of this law by presenting the ruling of the Commission in said Glade Coal Company case declaring the schedule about which we complain unlawful and abolish it. Had our Court given us the benefit of the law to which we were entitled, then by their own statement the Court would have rendered judgment in our favor; for the question as to whether or not the decision of the Commission as published could be used in our behalf was the only thing on which the Court decided against us. This brings our State Court face to face with the enactment of Congress. It seems to require no argument that the Congress had the right to enact the aforesaid amendmens if it had the right to regulate commerce in the manner it did at all.

Respectfully submitted,

C. H. LEEDS,

For Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 170.

CLARENCE D. ROBINSON,
Plaintiff in Error.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR, THE BALTIMORE AND OHIO RAILROAD COMPANY.

STATEMENT.

Plaintiff in error, hereinafter called the plaintiff, sued defendant in error, hereinafter called the defendant, to recover the sum of one hundred and fifty dollars alleged to be the amount of overcharges of freight on eleven carloads of coal shipped by the plaintiff over defendant's line of railroad during the first five months of the year 1903.

The case was submitted to the trial court, the Circuit Court of Marion County, West Virginia, on an agreed statement of facts (Record, page 7). It was therein agreed that all of said shipments were interstate ones, and that the schedule of rates for such shipments had been lawfully and regularly published

and filed with the Interstate Commerce Commission. Such schedules provided that shippers of coal loaded into cars from sidetracks where no tipple was used should pay fifty cents per ton in excess of the rate paid by shippers of coal loaded over regular tipples. (Record, page 9). These rates were uniformly applied to all, and plaintiff had full knowledge of the rates and of the conditions attached thereto before and at the time these shipments were made. All of the shipments involved were loaded into the cars from sidetracks and not from tipples. The rates applied were those filed with the Interstate Commerce Commission and were the same as those charged all other shippers who loaded their coal from sidetracks and not from regular tipples.

We do not deem it necessary in this case to discuss the reasons for the distinction in rates above referred to, and, indeed, there is nothing in the record that would warrant such discussion. The trial court rendered judgment for the defendant, and this judgment was affirmed by the Supreme Court of Appeals of West Virginia.

ARGUMENT.

(NOTE.—The references to the Act to Regulate Commerce pertain to the law in effect in 1903, and not to subsequent amendments, except where the latter are specifically cited.)

1. *The Interstate Commerce Commission alone has original jurisdiction of suits brought by shippers to recover unreasonable freight charges exacted by carriers on interstate shipments.*

The Supreme Court of Appeals of West Virginia denied the right of the plaintiff to recover in this action, but it implied that such right of recovery would have existed had the record shown that the Interstate Commerce Commission had previously held the rates complained of to be unreasonable.

We submit that under the provisions of the act to regulate

commerce as defined by the Abilene and subsequent cases, no right of action at common law exists whereby shippers can, in the first instance, recover unreasonable freight charges exacted on interstate shipments. Every shipper seeking reparation in such cases must apply originally to the Commission, and not to the courts. His rights in court are secondary. The courts are open to him to enforce the reparation orders of the Commission or, in proper cases, to grant him that relief which the Commission has denied him. In other words, the courts no longer have original jurisdiction of such questions. Their only jurisdiction is to enforce the Commission's orders or, as appellate tribunals, to hear complaints that originated before the Commission.

The leading case, that of Texas & Pacific Ry. Co. *vs.* Abilene Cotton Oil Company, 204 U.S. 426, is, we believe ample authority for this proposition. In denying the Abilene Cotton Oil Company's contention, the present Chief Justice pointed out the incongruity of allowing the common law courts to entertain the so-called reparation complaints. As he there stated, the act destoyed itself did it permit every court in the land to pass on the reasonableness *vel non* of interstate freight rates and allow or refuse reparation accordingly. Such procedure would breed one of the worst evils that the act attempted to correct, the evil of discrimination.

In summing up its conclusions in that case the court said:

> ". . . a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule. . ."
>
> 204 U. S. 448.

As we read this, it means, and can mean only, that each

individual shipper must go primarily to the Commission for redress whether or not the particular rate complained of has previously been declared unreasonable by the Commission in a proceeding instituted by some other shipper, to whom the Commission may or may not have granted reparation for the exaction of the unreasonable charge.

That the courts have no jurisdiction to give relief to the shipper unless that particular shipper has first gone to the Commission with his complaint, is again evident from the court's association of the question of jurisdiction with the question of the right to the relief sought.

> "As presented below and pressed at bar, the question takes a seemingly two-fold aspect, the jurisdiction of the court below as affected by the act to regulate commerce and the right to the relief sought consistently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first to the consideration of that subject."
>
> 204 U. S. 435-6.

And later we have this significant statement in the Abilene decision:

> "In other words, we think that it inevitably follows

> from the context of the act that the independent right of an individual originally to maintain actions in court to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."
>
> (page 442).

Having then disposed of the ninth section of the act, the court proceeded to discuss section 22 and, referring to that section said:

> "This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."
>
> (page 446).

That each shipper must make his complaint primarily to the Commission, and that courts cannot give him relief on the theory that the Commission has previously declared the rate or practice unreasonable, is again apparent from the decision of

this court in B. & O. *vs.* U. S. *ex rel.* Pitcairn Coal Company, 215 U. S. 481. The questions there involved related to alleged unjust preferences and undue discriminations in the distribution of coal cars. This court held that "the controversy is controlled by the considerations which governed the ruling" made in the Abilene case, and directed that the petition for mandamus be dismissed on the ground that the Interstate Commerce Commission alone has original jurisdiction of such questions. If, as contended by the plaintiff in the case at bar, a previous adjudication of the subject matter by the Commission authorized the court to take original jurisdiction of a complaint of another shipper even though such shipper had not himself primarily invoked relief from the Commission, the Circuit Court in the Pitcairn case had before it a previous finding of the Commission with respect to one of the very questions in issue. As this court said:

> "One of the questions which we would be called upon to decide if the merits were open is whether the court below was right in holding that if anything but the physical capacity of a mine was taken into consideration by a railroad company in rating the mine for car distribution in time of car shortage, the act to regulate commerce would be violated, and therefore the system adopted by the Baltimore and Ohio Railroad Company was repugnant to the act, because it made not alone the physical capacity but past shipments factors to be considered. But the reports of the Interstate Commerce Commission show that on a complaint made to that body on the subject of the system of mine rating of the Baltimore and Ohio Railroad Company, the Commission, before the decision of the Circuit Court of Appeals in this case was announced, had expressly refused to hold that the system was either preferential of prejudicial within the act to regulate commerce."
>
> (page 495).

Notwithstanding this adjudication of the Commission with respect to part of the very subject matter of the complaint of the Pitcairn Coal Company, this court dismissed the latter's petition because that complainant had not primarily invoked redress from the Commission and therefore because the Circuit Court had no jurisdiction.

That the decision in the Abilene case was not in any way qualified by the later case of Southern Railway Co. *vs.* Tift, 206 U. S. 428, is pointed out by this court in the Pitcairn case:

> "Nor is there anything in the contention that the decision in Southern R. Co. *vs.* Tift, 206 U. S., 428, qualifies the ruling in the Abilene case, and is an authority supporting the right to resort to the courts in advance of action by the Commission for relief against unreasonable rates or unjust discriminatory practices which, from their nature, primarily require action by the Commission. While it is true, that the original bill in the Tift case sought relief from alleged unreasonable rates before action by the Commission, yet, as said by this court (p. 437) :
>
> "'The circuit court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for the

respective parties agreed that this could stand for and be the hearing for final decree in equity.' "

215 U. S., 481, at page 500.

While we feel that the decisions just mentioned clearly sustain our position that the trial court had no jurisdiction to give plaintiff relief even had the record shown that in a complain by another party before the Commission that body had declared the very rates in question to be unreasonable, we wish to point out what would be the result if it were held that the Commission did not have sole jurisdiction of reparation complaints of this character.

Plaintiff practically rests his case on the decision of the Interstate Commerce Commission in the case of Glade Coal Company *vs.* Baltimore and Ohio Railroad Company, 10 I. C. Rep. 226. That case involved two complaints: first, as to discrimination in the furnishing of cars, for which reparation was allowed, and second, as to alleged unreasonable freight rates, for which *no reparation was allowed by the Commission even though it declared the rate unreasonable.*

Had the trial court in the case at bar allowed plaintiff reparation, it would be a striking example of the very discrimination that this court referred to in the Abilene case; no reparation for the Glade Coal Company; reparation for Robinson; therefore discrimination in favor of Robinson. This discrimination would be extended further, as some courts would allow and others deny reparation to other complainants who may have shipped under the rates complained of. The result would be, as so aptly pointed out by this Court in the Abilene case, " the destruction of the act to regulate commerce."

The Interstate Commerce Commission in declaring a rate unreasonable grants or refuses reparation as it deems proper under the circumstances, *but it grants or refuses it to all parties affected by the unreasonable rate without discrimination.* (Section 14 of the act to regulate commerce of 1887, as amended, March 2, 1889, provides " That whenever an in-

vestigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendations as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured"). We do not have such a situation as would exist were plaintiff's contention upheld,—that, for instance, of a court in Maryland allowing reparation and a court in Pennsylvania refusing reparation, and so on through all the courts that might have the questions before them.

The advantages of giving the Commission sole jurisdiction to grant reparation as well as to pass on the reasonableness of the rates are shown by the statement of this court in the Abilene case:

> "When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one."
>
> (Page 446.)

This latter illustration exactly fits Robinson's case, if it be assumed that the rate in question was unreasonable. He sought reparation "because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one."

And again, with one body having sole jurisdiction of reparation complaints, there is but one statute of limitations by which the parties must be governed. While it is true that is a matter relating only to the remedy, it is equally true that this whole controversy relates only to remedies, and, as a practical matter, those complainants residing in States with liberal statutes of limitation would have an advantage over those in states with stricter statutes, if common law courts had jurisdiction.

The plaintiff in his petition for rehearing in the Supreme Court of Appeals of West Virginia, sought to distinguish the case at bar from the Abilene case by claiming the present case to be a question of "discrimination in rates" and not of "unreasonableness of rates," as in the Abilene case. That the law and reasoning of this court in the Abilene case apply to discriminatory rates and practices as well as to unreasonable ones seems too clear for argument. As the Interstate Commerce Commission said in the case of Railroad Commission of Ohio *vs.* Hocking Valley Railroad Company, 12 I. C. C. Rep. 398:

> "Every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this Commission has original jurisdiction of questions of discriminatory practices prohibited by the act to regulate commerce."

And the case of B. & O. Railroad Co. *vs.* U. S. ex rel. Pitcairn Coal Company, supra, seems to be a complete answer to this portion of plaintiff's argument.

In concluding the discussion of this question, it is well to note that the causes of action accrued between February 6, 1903, and May 9, 1903. The Elkins Act was approved February 19, 1903, and this court said in the Abilene case:

> "As we have seen, although the act to regulate com-

merce has been in force for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins Act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish 'the tariffs or rates and charges,' as required by the act to regulate commerce and the acts amendatory thereof, 'or strictly to observe such tariffs until changed according to law,' was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit or receive any rebate from published rates or other concession or discrimination."

(Page 445-6.)

And the court follows this up by quoting a portion of section 1 of the Elkins Act and referring to section 3.

2. *Even if proposition* 1. *be unsound, there is no evidence of a previous adjudication by the Commission.*

There was no evidence offered to prove that the Interstate Commerce Commission had previously adjudicated this question. Plaintiff, in the Supreme Court of Appeals of West Virginia, cited the case of Glade Coal Company *vs.* B. & O. Railroad Company, supra, wherein the Commission, in a complaint involving the fifty-cent per ton charge on shipments loaded from sidetracks on defendants' road in the State of Pennsylvania, held such charge unreasonable and ordered that the differential be abolished. The Supreme Court of Appeals of West Virginia held that under the decision of the Abilene case nothing but the evidence of a prior adjudication by the Commission would justify a judgment for the plaintiff, and that there was no such evidence in the record. The court held that the trial court could not have taken judicial notice of the Commission's decision in the Glade Coal Company case, adding that

> "Courts do not ordinarily take judicial notice of their records and proceedings in other causes, and there are few, if any, instances in which they will take judicial notice except as precedents, of the decisions and proceedings in other courts in other causes. I Elliott on Evidence, section 58; Ballard *vs.* Thomas, 19 Grat. 14."

We submit that any other finding would be untenable. In all actions at common law, each party has the right of cross-examination and the right to offer evidence in rebuttal of that offered by the opposing party. The Glade Coal Company decision was not in evidence and no opportunity was given the defendant to show, if such were the case, any change in or reversal of the Glade Coal Company finding by a later decision of the Commission. *Indeed there is not one word in the record*

to show that the Glade Coal Company decision was in any way called to the attention of the trial court. Even had the attention of the trial court been called to this decision the mere citation of the case by the plaintiff's attorney in his argument would have furnished no fair or reasonable opportunity to defendant to rebut or disprove that which, if it have the same effect as evidence, would have been absolutely conclusive of the parties' right and liabilities—if we accept the plaintiff's other proposition as sound. Furthermore, the opinion of the Commission in the Glade case (and nothing but the opinion is referred to in the Record) would be no proof of "a previous adjudication" of the question by the Commission. The whole record would be absolutely essential. The fact that the Commission held the fifty-cent per ton charge unreasonable in the Pennsylvania mining regions is no proof that it would have held the charge unreasonable in the West Virginia mining regions where conditions are totally dissimilar.

Plaintiff's attorney in his brief appended to the petition for rehearing apparently was not sure just what bearing the Glade Coal Company decision had on the case at bar.

> "It is not necessary in our case, as held by your Honors, to get a copy of the record of the Glade Coal Company case, decided by the Interstate Commerce Commission, to maintain our case. This case is cited by us as a precedent, showing what the Commission in cases like ours, held to be unlawful discrimination."
>
> (Record, page 20.)

By his own admission, therefore, the plaintiff tears down the structure that he has been attempting to erect. By his own admission the Glade Coal Company decision was not before the Court as proof of "a previous adjudication of the question." Indeed, as he states it, it was not a previous ajudication of the question; it was merely a decision in a case "like" the case at bar. Further on (Record, page 20) he makes some attempts

to extricate himself from the position into which he had placed himself.

For the reasons stated in proposition 1, as well as for those given by the Supreme Court of Appeals of West Virginia and referred to in proposition 2, we respectfully submit that the judgment of the Supreme Court of Appeals of West Virginia should be affirmed.

H. L. BOND, JR.,
W. IRVINE CROSS,
A. HUNTER BOYD, JR.,

Counsel for the Baltimore and Ohio Railroad Company, Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 170.

CLARENCE D. ROBINSON,
Plaintiff in Error.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant in Error.

REPLY BRIEF OF THE DEFENDANT IN ERROR.

The Baltimore and Ohio Railroad Company, defendant in error, respectfully requests the court to receive this reply brief, submitted for one reason only, viz., to correct a misstatement made by Plaintiff in error in his reply brief relative to the decision of the Interstate Commerce Commission in the Glade Coal Company case, 10 I. C. C. Reports, 226.

On page 7 of plaintiff in error's reply brief, it is stated,

> "Counsel for defendant say that no reparation was allowed to the Glade Coal Company in that case, 10 I. C. C., 226. Here counsel again are in error. The Commission in that case did allow reparation in so far as the fifty cents additional is concerned. They said:

'Defendants subjected complainants to undue and unreasonable prejudice and disadvantage and gave to such competitors undue and unreasonable preference and advantage, in violation of Section 3 of the act, and should be required to compensate complainants for the damage they suffered in consequence of such refusal, which, as stated in the findings of fact, is fifty cents per ton on 193 tons of coal, or the sum of $96.50.' And in the conclusion of the case the Commission said 'An order in accordance with the views herein expressed will be made.' So that the argument of counsel for defendant on page 8, of their brief, as to this point is, also, erroneous. The Commission did allow reparation."

The above statement refers to the following statement on page 8 of defendant in error's brief:

"Plaintiff practically rests his case on the decision of the Interstate Commerce Commission in the case of Glade Coal Company *vs.* Baltimore and Ohio Railroad Company, 10 I. C. C. Rep., 226. That case involved two complaints; first, as to discrimination in the furnishing of cars, for which reparation was allowed, and second, as to alleged unreasonable freight rates, for which *no reparation was allowed by the Commission even though it declared the rate unreasonable.*

"Had the trial court in the case at bar allowed plaintiff reparation, it would be a striking example of the very discrimination that this court referred to in the Abilene case; no reparation for the Glade Coal Company; reparation for Robinson; therefore discrimination in favor of Robinson. This discrimination would be extended further, as some courts would allow and others deny reparation to other complainants who may

ed under the rates complained of. The result
have shipp as so aptly pointed out by this Court in the
would be, ase 'the destruction of the act to regulate
Abilene ca "
commerce.'

these; The reparation of $96.50, being 50
The facts are 193 tons of coal, was ordered by the Com-
cents per ton on ecause of the Baltimore and Ohio Railroad
mission solely be l to furnish cars to the Glade Coal Company.
Company's refusa error quoted all, and not half, of the sentence
Had plaintiff in would have been apparent to the court and this
in question, this w l have been unnecessary. The whole sentence
reply brief would
reads as follows:

"But by refusing to furnish such a proportion of cars
to complainants on the Deal side-track at Meyersdale
and the side-track of the Savage Fire Brick Company
at Keystone Junction between February 25 and March
26, 1903, while furnishing and offering to furnish cars
to complainants' competitors at Sand Patch, Rockwood,
Boynton and other points, to be loaded from wagons
and sleds and tipples, defendant subjected complainants
to undue and unreasonable prejudice and disadvantage
and gave to such competitors undue and unreasonable
preference and advantage, in violation of Section 3
of the Act, and should be required to compensate com-
plainants for the damage they suffered in consequence
of such refusal, which, as stated in the findings of fact,
is 50 cents per ton on 193 tons of coal, or the sum
of $96.50."

(10 I. C. C. Rep. 242).

The 50 cents p
to the 50 cent c per ton referred to has no relation whatsoever
the case at bar, harge which is the basis of the complaint in
but, as the court will see by reading page

231 of the Glade Coal Company decision, the 50 cents per ton reparation allowed in the Glade Coal Company case was the difference between what the Commission found to be the market value of the coal, viz., $2 per ton, and what the Commission found to be the cost price of the coal, viz., $1.50 per ton.

We reiterate that no reparation was allowed the Glade Coal Company on account of the 50-cent per ton charge on shipments loaded from side-tracks, even though the Commission in that case declared the tariff which provided the charge to be unreasonable. This would have been readily apparent had plaintiff in error fairly quoted the paragraph on page 242 in the decision of the Glade case.

H. L. BOND, JR.,
W. IRVINE CROSS,
A. HUNTER BOYD, JR.,
Counsel for the Baltimore and Ohio Railroad Company, Defendant in Error.